Nos. 08-803, 08-810 and 08-826

In the Supreme Court of the United States

MATTHEW D. ALFIERI, ET AL., PETITIONERS

v.

SALLY L. CONKRIGHT, ET AL.

SALLY L. CONKRIGHT, ET AL., PETITIONERS

v.

PAUL J. FROMMERT, ET AL.

KENNETH PIETROWSKI, ET AL., PETITIONERS

v.

SALLY L. CONKRIGHT, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELENA KAGAN
Solicitor General
Counsel of Record

EDWIN S. KNEEDLER
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

CAROL A. DE DEO
Deputy Solicitor for National Operations

TIMOTHY D. HAUSER
Associate Solicitor

ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation

EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether the court of appeals applied correct standards of review in this denial-of-benefits case under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, when it concluded that:

   (a) the administrator of an ERISA plan whose denial of benefits violated ERISA was not entitled to deference regarding its opinion on how to remedy the violation, and

   (b) the district court's choice of remedy should be reviewed for abuse of discretion.

2. Whether the court of appeals applied correct legal principles in holding that employees who signed general releases knowingly and voluntarily waived their claims under ERISA.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Discussion 8
A. The issues in No. 08-810 do not warrant this Court's review 9
B. The issues in Nos. 08-826 and 08-803 do not warrant this Court's review 18
Conclusion 22

TABLE OF AUTHORITIES

Cases:

Administration Comm. of Wal-Mart Assoc. Health & Welfare Plan v. *Willard*, 393 F.3d 1119 (10th Cir. 2004) 15
Barrett v. *Safeway Stores, Inc.*, 538 F.2d 1311, 1313 (8th Cir. 1976) 17
Burkhart Grob Luft und Raumfahrt GmbH & Co. KG v. *E-Systems, Inc.*, 257 F.3d 461 (5th Cir. 2001) 13
Canseco v. *Construction Laborers Pension Trust*, 93 F.3d 600 (9th Cir 1996), cert. denied, 520 U.S. 1118 (1997) 12
Central States, Se. & Sw. Areas Pension Fund v. *Central Transp., Inc.*, 472 U.S. 559 (1985) 15
Chaplin v. *NationsCredit Corp.*, 307 F.3d 368 (5th Cir. 2002) 20
Colton v. *Colton*, 127 U.S. 300 (1888) 11
Cook v. *Liberty Life Assurance Co.*, 320 F.3d 11 (1st Cir. 2003) 12, 13

Cases—Continued: Page

Downie v. *Independent Drivers Ass'n Pension Plan*, 934 F.2d 1168 (10th Cir. 1991) 13
Eddy v. *Prudence Bonds Corp.*, 165 F.2d 157 (2d Cir. 1947), cert. denied, 333 U.S. 845 (1948) 17
Emor, Inc. v. *Cyprus Mines Corp.*, 467 F.2d 770 (3d Cir. 1972) 17
FDIC v. *Brants*, 2 F.3d 147 (5th Cir. 1993) 17
Firestone Tire & Rubber Co. v. *Bruch*, 489 U.S. 101 (1989) 10
Gallo v. *Amoco Corp.*, 102 F.3d 918 (7th Cir. 1996), cert. denied, 521 U.S. 1129 (1997) 17
Grosz-Salomon v. *Paul Revere Life Ins. Co.*, 237 F.3d 1154 (9th Cir. 2001) 12
Halpin v. *WW. Grainger, Inc.*, 962 F.2d 685 (7th Cir. 1992) 12
Harte v. *Bethlehem Steel Corp.*, 214 F.3d 446 (3d Cir.), cert. denied, 531 U.S. 1037 (2000) 15
Hunter v. *Caliber Sys., Inc.*, 220 F.3d 702 (6th Cir. 2000) 15
Kennedy v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009) 21
Layaou v. *Xerox Corp.*, 238 F.3d 205 (2d Cir. 2001) 4
Leavitt v. *Northwestern Bell Tel. Co.*, 921 F.2d 160 (8th Cir. 1990) 18
Madrid v. *Phelps Dodge Corp.*, 211 Fed. Appx. 676 (10th Cir. 2006) 20
Metropolitan Life Ins. Co. v. *Glenn*, 128 S. Ct. 2343 (2008) 10

Cases—Continued: Page

Miller v. *Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006), cert. denied, 549 U.S. 1280 (2007) 13

Moench v. *Robertson*, 62 F.3d 553 (3d Cir. 1995), cert. denied, 516 U.S. 1115 (1996) 15

NLRB v. *Hobart Bros. Co.*, 372 F.2d 203 (6th Cir. 1967) 17

Pakovich v. *Broadspire Servs., Inc.*, 535 F.3d 601 (7th Cir. 2008) 16

Oliver v. *Coca-Cola Co.*, 546 F.3d 1353 (2008) 15, 16

Oubre v. *Entergy Operations, Inc.*, 522 U.S. 422 (1998) 20

Smart v. *Gillette Co. Long-Term Disability Plan*, 70 F.3d 173 (1st Cir. 1995) 18, 20

United States v. *Andrews*, 530 F.3d 1232 (10th Cir. 2008) 13

Welsh v. *Burlington N., Inc., Employee Benefits Plan*, 54 F.3d 1331 (8th Cir. 1995) 17, 18

White v. *Coca-Cola Co.*, 542 F.3d 848 (11th Cir. 2008), cert. denied, No. 08-991 (Apr. 6, 2009) 16

Worthy v. *New Orleans S.S. Ass'n*, 342 F.3d 422 (5th Cir. 2003) 15

Statutes:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 6

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* 2

29 U.S.C. 1022(a) 2

29 U.S.C. 1022(b) 2

Statutes—Continued: Page

29 U.S.C. 1054(g) 2, 4
29 U.S.C. 1054(h) 2, 4
29 U.S.C. 1104(a)(1)(D) 21
29 U.S.C. 1132(a)(1)(B) (§ 502(a)(1)(B)) 3, 10
29 U.S.C. 1132(a)(3) (§ 502(a)(3)) 3
Older Workers Benefit Protection Act, 29 U.S.C. 626 (f)(1) 6, 20
Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.* 18

Miscellaneous:

George G. Bogert & George T. Bogert, *The Law of Trusts & Trustees* (rev. 2d ed. 1980) 11
Restatement (Second) of Trusts (1959) 11
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3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* (4th ed. 1988) 11

In the Supreme Court of the United States

No. 08-803

MATTHEW D. ALFIERI, ET AL., PETITIONERS

v.

SALLY L. CONKRIGHT, ET AL.

No. 08-810

SALLY L. CONKRIGHT, ET AL., PETITIONERS

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petitions for a writ of certiorari should be denied.

STATEMENT

1. Under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, the administrator of an employee benefit plan must give plan participants a summary plan description (SPD) that "shall be sufficiently accurate and comprehensive to reasonably apprise [them] of their rights and obligations under the plan." 29 U.S.C. 1022(a). The SPD must provide notice of, among other things, "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. 1022(b). ERISA also generally requires the administrator of a pension plan to give participants prior written notice of any plan amendment that significantly reduces the rate of future benefit accrual. 29 U.S.C. 1054(h). And ERISA's anti-cutback provision prohibits amendments that decrease benefits that have already accrued. 29 U.S.C. 1054(g).

2. This case was brought by employees of Xerox Corporation who are participants in the Xerox Corporation Retirement Income Guarantee Plan (the Plan), an ERISA-covered pension plan that is a petitioner in No. 08-810. Pet. App. 24a-25a.[1] The employees were rehired by Xerox after previously leaving the company and receiving lump-sum distributions of pension benefits that they had accrued before their departures. *Id.* at 25a. The employees claim that the Plan and its administrators (the other petitioners in No. 08-810) violated ERISA by using a "phantom account" method to calculate the amount by which the employees' current pension benefits are offset to reflect their prior distributions. *Id.* at 75a. In essence, the phantom account

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix in No. 08-810.

method reduces an employee's current benefits to reflect not only the actual amount of the prior distribution, but also hypothetical investment gains that the distribution would have earned if it had remained in the employee's pension account and been invested. *Id.* at 5a.

The employees sued the Plan and its administrators under ERISA Section 502(a)(1)(B) and (3), 29 U.S.C. 1132(a)(1)(B) and (3). The employees argued that, until the Plan and the SPD were amended in 1998, the Plan did not provide for use of the phantom account method to calculate the offset for the distributions they previously received, and that the SPD did not disclose that the phantom account method would be used. Pet. App. 75a, 81a-82a. The employees contended that the Plan and its administrators had therefore violated ERISA's SPD, notice, and anti-cutback provisions. *Id.* at 75a-76a.

The district court granted summary judgment in favor of the Plan and its administrators. Pet. App. 61a-98a. As relevant here, the court accepted their argument that "the Plan has always provided for the challenged offset" and that the 1998 amendments only made express what the pre-1998 plan terms implicitly provided. *Id.* at 75a; see *id.* at 79a-93a.

3. The court of appeals vacated the district court's decision in relevant part. Pet. App. 22a-60a. The court of appeals found that, although the Plan has always contained a non-duplication provision stating that benefits will be offset by prior distributions, *id.* at 26a-28a, until 1998, the Plan did not address how to calculate the offset for the distributions received by the plaintiff employees. See *id.* at 28a-29a ("[T]he 1989 Restatement" of the Plan "did not specify how the Plan would account for the prior distributions."); *id.* at 37a ("Not until 1998, when the phantom account was fully explained in an SPD, was

the text of the Plan amended and adequate information provided to former Xerox employees concerning the treatment of their previous distributions."). The court observed that it had already held, in *Layaou* v. *Xerox Corp.*, 238 F.3d 205, 209-212 (2d Cir. 2001), that earlier versions of the Plan violated ERISA's SPD requirement by failing to "provide notice" that participants' "future benefits would be offset by an appreciated value of their prior lump-sum benefits distributions." Pet. App. 43a-44a (quoting *Layaou*, 238 F.3d at 210). Accordingly, the court held "that the Plan administrator's conclusion that the Plan always included the phantom account is unreasonable," even under "an arbitrary and capricious standard" of review. *Id.* at 44a. The court further held that the Plan's efforts to apply the phantom account method before issuance of the 1998 SPD violated the requirement in Section 1054(h) that plans provide advance notice of amendments that significantly reduce the rate of future benefit accrual, *id.* at 49a, and that application of the phantom account method to employees rehired before 1998 impermissibly reduced accrued benefits in violation of Section 1054(g), *id.* at 50a.

The court of appeals remanded the case for the district court to craft a remedy for those ERISA violations, "utiliz[ing] an appropriate pre-amendment calculation to determine [employees'] benefits." Pet. App. 51a. Noting "the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated," the court of appeals suggested that the district court "employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy." *Ibid.*

4. On remand, the district court determined that the plaintiff employees' benefits should be calculated by

subtracting the actual amount of prior distributions without adjustment for hypothetical investment gains or losses. Pet. App. 102a-108a. Noting that the pre-1998 plan terms said "virtually nothing" about how to account for prior distributions, *id.* at 104a, the court reasoned that deducting the actual amount of the distributions is straightforward, adequately prevents employees from receiving a windfall, and "most clearly reflects what a reasonable employee would have anticipated based on the not-very-clear language in the Plan and SPD." *Id.* at 107a. The court rejected testimony that "focused on the appropriate economic, financial and actuarial methods for treating prior distributions," stating that "[i]f the employee had no notice of the 'phantom account,' he also had no notice of some of the other mechanisms suggested by witnesses at the remand hearing." *Id.* at 104a.

The district court also concluded that 22 of the plaintiff employees, 18 of whom are petitioners in Nos. 08-803 and 08-826, were entitled to relief even though they had signed general releases when their employment was terminated through reductions in force that occurred during the litigation. Pet. App. 109a-121a.[2] The court reasoned that plan participants may waive ERISA claims, but a waiver must be knowing and voluntary and is subject to closer scrutiny than a waiver of general contract claims. *Id.* at 112a-113a. Applying a "totality of the circumstances" test previously adopted by the court of appeals, the district court concluded that although some considerations weighed in favor of uphold-

[2] The four release signers who are not petitioners in Nos. 08-803 or 08-826 altered their releases to exclude their claims in this litigation, and the Plan and its administrators conceded that their claims are not barred. Pet. App. 14a n.4, 111a.

ing the releases, they should not be given effect because of deficiencies in the "clarity of the release[s] and the consideration given by Xerox in exchange for the releases." *Id.* at 113a-114a (citation omitted).

In particular, the district court found that the releases were ambiguous because although they stated that they covered "any and all claims," including ERISA claims, they also stated that the consideration for the releases was "in addition to anything of value to which [the employee] is entitled by law and/or Xerox policy." Pet. App. 114a (citation omitted). The court concluded that the latter language could be read to preserve the employees' rights to pension benefits calculated without a "phantom account" reduction because the court of appeals had held that the employees were "entitled by law" to those unreduced benefits. *Id.* at 115a-116a. The district court also stated that the failure of the releases to comply with requirements in the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. 626(f)(1), which governs waivers of claims under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, was "some evidence" that the waivers were not knowing and voluntary. Pet. App. 116a n.5.

5. The court of appeals upheld the district court's choice of a remedy for the ERISA violations, but vacated the district court's holding that the releases were unenforceable. Pet. App. 1a-21a.

The court of appeals reviewed the district court's choice of remedy for abuse of discretion. Pet. App. 8a. The court of appeals concluded that the Plan and its administrators had failed to establish that the district court's approach "violated either the Plan terms or any law." *Id.* at 9a. The court also rejected their arguments that the district court erred by not adopting an approach

that would have treated the plaintiffs as newly hired employees, by not remanding the remedy issue to the plan administrator, and by failing to defer to the administrator's approach. *Id.* at 9a-14a.

In addressing the deference due the administrator's approach, the court of appeals recognized that where an ERISA plan gives the administrator discretionary authority to construe plan terms, a district court should review the administrator's decision "under an excess of allowable discretion standard." Pet. App. 12a. The court of appeals concluded, however, that the deference principle did not apply to the remedial determination in this case because the district court had no "decision" to review. *Id.* at 13a. The court of appeals explained that the Plan and its administrators had identified "no authority in support of the proposition that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and [the court] found such a construction to have violated ERISA." *Ibid.* Because the Plan "addresses the situation of a discharged-and-then-rehired employee with what can only be described as ambiguity, contradiction or silence," the court saw "no problem with the District Court's selection of one reasonable approach among several reasonable alternatives." *Id.* at 13a-14a.

Turning to the releases signed by the petitioners in Nos. 08-803 and 08-826, the court of appeals held that the releases were enforceable. Pet. App. 14a-21a. It rejected the district court's view that the releases were ambiguous, explaining that the district court had "conflated the existence of consideration adequate to render a release enforceable with the scope of claims thereby released." *Id.* at 18a. The court of appeals concluded

that the language in which the district court had found ambiguity (see p. 6, *supra*) "provided only that the consideration for the release[s], *i.e.*, the salary continuance[s], did not replace any benefits, including pension benefits, to which the employee[s] w[ere] already entitled." Pet. App. 19a. Noting that the employees had not alleged that Xerox had violated that provision by denying them pension benefits based on the salary continuances, the court concluded that uncertainty over the amount of benefits when the releases were signed did not render them unenforceable. *Id.* at 19a-20a.

The court of appeals then applied the "totality of the circumstances" test articulated in circuit precedent and, based on "the undisputed facts," determined that the releases were knowing and voluntary. Pet. App. 20a-21a. The court stated that it need not decide whether the releases complied with the OWBPA because that statute is irrelevant to ERISA claims. *Id.* at 18a n.5.

DISCUSSION

The court of appeals correctly upheld the district court's choice of remedy for the ERISA violations committed by the petitioners in No. 08-810 (the Xerox petitioners), and the court of appeals' rulings on the remedy issue do not conflict with any decision of this Court or another court of appeals. This Court's review of the uestions presented in No. 08-810 is therefore not warranted. Nor is review warranted of the court of appeals' holding that the petitioners in Nos. 08-803 and 08-826 (the release petitioners) validly released their ERISA claims. Contrary to the release petitioners' contentions, the court of appeals did not adopt a new standard for assessing the enforceability of releases of ERISA claims, reject the applicability of common law principles

in ERISA cases, or erroneously fail to apply OWBPA standards. And the court's decision on the release issue is consistent with decisions of this Court and other courts of appeals. Accordingly, this Court should deny all three petitions for a writ of certiorari.

A. The Issues In No. 08-810 Do Not Warrant This Court's Review

1. a. Contrary to the contentions of the Xerox petitioners (Pet. 11-12, 17-22), the court of appeals correctly held that the district court was not required to defer to the plan administrator's views on the appropriate remedy for the ERISA violations committed by the administrator and the Plan. When the district court crafted that remedy, the court of appeals had already concluded that the pre-1998 Plan (including its non-duplication-of-benefits provision) did not address how to calculate the amount by which the plaintiff employees' benefits should be offset to account for their prior distributions. Pet. App. 28a-29a, 37a. The court of appeals had also already held that the Plan's failure to specify an offset method and the administrator's efforts to impose the phantom account method violated ERISA's SPD and notice requirements, *id.* at 43a-51a, and that the administrator had arbitrarily and capriciously interpreted the pre-1998 plan terms to incorporate the phantom account method, *id.* at 44a. See pp. 3-4, *supra*. In those circumstances, the district court had no obligation to defer to the administrator's newly-minted assertion that the same pre-1998 plan terms provided for a different offset method. On the contrary, because the court of appeals had determined that the plan terms were silent on the appropriate offset method, the district court had discretion to select a reasonable method in the exercise of

its discretion to craft an appropriate remedy for the ERISA violations. See Pet. App. 12a-14a.[3]

In *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989) (*Firestone*), this Court held that courts should be "guided by principles of trust law" when they "determin[e] the appropriate standard of review" for decisions in actions, like this one, challenging benefits determinations under 29 U.S.C. 1132(a)(1)(B). Based on trust principles, the Court further held that a benefits decision by a plan administrator is reviewed de novo, unless the administrator is exercising discretion conferred by the plan to determine eligibility for benefits or to construe the plan terms, in which case abuse-of-discretion review applies. *Firestone*, 489 U.S. at 111-115. In *Metropolitan Life Insurance Co.* v. *Glenn*, 128 S. Ct. 2343 (2008), this Court reaffirmed *Firestone*'s approach, relying on trust law in concluding that a reviewing court should consider an administrator's conflict of interest as one "of several different, often case-specific, factors" that are "weigh[ed] all together" to determine the lawfulness of the administrator's action. *Id.* at 2351 (citing,

[3] The district court's decision not to defer to the administrator's proposed offset method was particularly reasonable given that this method was only one of two alternative approaches that the Xerox petitioners advanced on remand. See 08-810 Pet. C.A. Br. 6, 16, 33-36 (discussing alternative "new hire" approach); C.A. App. A113 (same). The Xerox petitioners' contention that the court erred in declining to defer to the plan administrator's method thus cannot be reconciled with their own advocacy of a different method. Moreover, the Xerox petitioners did not clearly and timely ask the district court to defer. Compare 08-810 Pet. Pre-Hearing Br. Addressed to Remedies (failing to ask for deference) and C.A. App. A389, A395 (appearing to agree with district court that deference not warranted) with 08-810 Pet. Pre-Hearing Reply Br. Addressing Remedies 2 (asking for deference).

inter alia, Restatement (Second) of Trusts § 187 cmt. d at 403 (1959) (Second Restatement)).

The court below acted consistently with trust law in holding that the district court was not required to defer to the plan administrator's preferred approach to the offset issue when crafting a remedy for the administrator's ERISA violations. Even where a trustee has discretion to determine the benefits of a trust beneficiary, a "court will control the trustee in the exercise of [that] power" if the trustee makes an "arbitrary decision" or acts "beyond the bounds of a reasonable judgment." Second Restatement § 187 cmts. h and i; see 2 Restatement (Third) of Trusts § 50 & cmt. b (2003) (Third Restatement); 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 187, 187.2, 187.3 (4th ed. 1988) (Scott). "Where the court finds that there has been [such] an abuse of a discretionary power, the decree to be rendered is in its discretion." George G. Bogert & George T. Bogert, *The Law of Trusts & Trustees* § 560, at 222 (rev. 2d ed. 1980) (Bogert). In exercising that discretion, the court may, if the circumstances warrant, make its own judgment about the benefits due and order payment by the trustee. See *id.* at 223. Thus, the court may, in appropriate circumstances, "itself fix the amount" that the trustee shall pay rather than defer to the trustee to determine a reasonable amount. Scott § 187.1, at 28; see Third Restatement § 50 cmt. b at 261; Bogert § 560, at 223 n.19 (giving examples); see, *e.g.*, *Colton* v. *Colton*, 127 U.S. 300, 322 (1888).

In accord with these principles and the decision below, other courts of appeals have held that "[o]nce a court finds that an administrator has acted arbitrarily and capriciously in denying a claim for benefits, the court can either remand the case to the administrator

for a renewed evaluation of the claimant's case, or it can award a retroactive reinstatement of benefits." *Cook* v. *Liberty Life Assurance Co.*, 320 F.3d 11, 24 (1st Cir. 2003). See, *e.g.*, *Halpin* v. *WW. Grainger, Inc.*, 962 F.2d 685, 697 (7th Cir. 1992). "[T]he principle of ERISA deference does not deprive a court of its discretion to formulate a necessary remedy when it determines that the plan has acted inappropriately." *Cook*, 320 F.3d at 24. Thus, a court is not required in all cases to allow the administrator a second opportunity to determine the appropriate level of benefits when the court has determined that the administrator acted arbitrarily in construing plan language. See, *e.g.*, *Canseco* v. *Construction Laborers Pension Trust*, 93 F.3d 600, 609 (9th Cir. 1996), cert. denied, 520 U.S. 1118 (1997). Reconsideration by the administrator may be appropriate in some cases where the administrator simply failed adequately to explain its reasoning or where the correct determination of benefits will depend on the construction of plan language that actually addresses the issue but is ambiguous. See *Grosz-Salomon* v. *Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (9th Cir. 2001). Here, however, the administrator's initial interpretation had already been found unreasonable and in violation of ERISA, and a correct determination did not depend on construing ambiguous plan terms because the plan said "virtually nothing" about how to calculate an offset. Pet. App. 104a.

b. For similar reasons, the Xerox petitioners are also incorrect in asserting (Pet. 28-33) that the court of appeals applied the wrong standard in reviewing the district court's choice of remedy. Because a district court has discretion to fashion the appropriate remedy when a trustee has abused his authority, a court of appeals should review the district court's choice of remedy in

such circumstances for abuse of discretion. That approach accords with principles of trust law, under which courts of appeals review a district court's choice of equitable remedies for abuse of discretion. See *United States* v. *Andrews*, 530 F.3d 1232, 1238 (10th Cir. 2008); *Burkhart Grob Luft und Raumfahrt GmbH & Co. KG* v. *E-Systems, Inc.*, 257 F.3d 461, 469 (5th Cir. 2001). And it is consistent with the case law under ERISA. See, *e.g.*, *Cook*, 320 F.3d at 24 ("An appellate court reviews a district court's choice of remedy for an ERISA violation for abuse of discretion."); *Downie* v. *Independent Drivers Ass'n Pension Plan*, 934 F.2d 1168, 1170 (10th Cir. 1991) (same).

Contrary to the Xerox petitioners' contention (Pet. 28), application of abuse-of-discretion review in this case does not conflict with the rule that judicial review of interpretations of written instruments is generally de novo. Nor does applying abuse-of-discretion review here authorize district courts to adopt conflicting interpretations of the same plan language. Pet. 33. As discussed above, the district court was not interpreting plan terms when it fashioned the remedy here, because the Plan was silent about how to calculate the offset for the prior distributions. See pp. 3-4, 9, 12, *supra*; Pet. App. 13a, 28a-29a, 37a, 104a.[4]

[4] The Xerox petitioners are mistaken in asserting (Pet. 26-27) that *Miller* v. *Xerox Corp. Retirement Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006), cert. denied, 549 U.S. 1280 (2007), required the plan administrator to use the offset method that the administrator advocated on remand in this case. The Ninth Circuit in *Miller* held that using the phantom account method to offset benefits violated ERISA because it reduced pension benefits by more than the accrued benefit attributable to earlier distributions. *Id.* at 872, 874. Although the court stated that "the offset *permitted*" was "one based on the actual actuarial equivalent" of the prior distribution, *id.* at 876 (emphasis added), the court did

2. a. The Xerox petitioners err in contending (Pet. 12, 17-22) that the decision below conflicts with this Court's decisions in *Firestone* and *Glenn*. That contention is based on the incorrect premise that the court of appeals held "that no deference is due to a plan administrator's interpretation of plan language when the administrator interprets the plan outside of the plan's administrative claims process." *Id.* at 12. The court made no such holding. Instead, the court held that deference to the administrator's opinion on the appropriate offset method was not required because "the administrator had previously construed the same terms" and the court had "found such a construction to have violated ERISA." Pet. App. 13a. Moreover, the court of appeals had already determined that those terms did not address the offset method. *Id.* at 13a, 28a-29a, 37a. Neither *Firestone* nor *Glenn* addresses whether a plan administrator is due deference when the administrator proposes a new interpretation of plan terms that the administrator previously construed arbitrarily and capriciously and in violation of ERISA. Nor do they address whether deference is due when a court has already determined that the plan terms do not speak to the relevant issue.

b. For similar reasons, the Xerox petitioners are incorrect in contending (Pet. 12-17) that the court of ap-

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not *require* the plan to offset benefits by an actuarial equivalent rather than only the actual amount of the prior distributions, much less require use of the particular actuarial equivalent proposed by the administrator on remand in this case. Nor did the court in *Miller* consider whether the ERISA violations found in this case, including the SPD and notice violations, might weigh against adoption of an offset based on any amount greater than the actual amount of prior distributions. See Pet. App. 104a (district court's conclusion that "[i]f the employee had no notice of the 'phantom account,' he also had no notice of some of the other mechanisms suggested by witnesses at the remand hearing").

peals' deference ruling conflicts with decisions of other courts of appeals. Most of the cases cited by the Xerox petitioners involve the application by courts of appeals of deferential review to a plan administrator's interpretation of plan provisions even though that interpretation was not expressed through a decision on a benefits claim. See *Administrative Comm. of Wal-Mart Assoc. Health & Welfare Plan* v. *Willard*, 393 F.3d 1119, 1123 (10th Cir. 2004); *Worthy* v. *New Orleans S.S. Ass'n*, 342 F.3d 422, 427-428 (5th Cir. 2003); *Hunter* v. *Caliber Sys., Inc.*, 220 F.3d 702, 711 (6th Cir. 2000); *Harte* v. *Bethlehem Steel Corp.*, 214 F.3d 446, 448 (3d Cir.), cert. denied, 531 U.S. 1037 (2000); *Moench* v. *Robertson*, 62 F.3d 553, 566-567 (3d Cir. 1995), cert. denied, 516 U.S. 1115 (1996); see also *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 568 (1985). Because the decision below does not hold that a plan administrator receives deference only for an interpretation expressed through a decision on a benefits claim, it does not conflict with those decisions. In addition, unlike the decision below, the decisions from the other circuits do not involve an administrator's second attempt to apply plan provisions after a court has rejected its previous interpretation as arbitrary and capricious and in violation of ERISA and has determined that the plan terms are silent on the relevant issue.

The other cases on which the Xerox petitioners base their claim of a conflict likewise do not involve these circumstances. In *Oliver* v. *Coca-Cola Co.*, 546 F.3d 1353, 1353-1354 (2008), the Eleventh Circuit held that a plan administrator had erroneously determined that a participant was not entitled to disability benefits. The court remanded the case to the district court for calcula-

tion of the benefits due, with instructions to allow the plan administrator to offer an interpretation of a plan term providing for plan benefits to be offset by Social Security benefits and to review the administrator's interpretation under the deferential standard articulated in *Glenn*. *Oliver* is consistent with the decision below because, when the Eleventh Circuit remanded *Oliver*, it had neither rejected the administrator's interpretation of the relevant plan provision nor determined that the provision was silent on the relevant issue. On the contrary, the Eleventh Circuit had held in a related case that the administrator's construction of the provision was reasonable. See *ibid.* (citing *White* v. *Coca-Cola Co.*, 542 F.3d 848, 853-857 (11th Cir. 2008), cert. denied, No. 08-991 (Apr. 6, 2009)).

The decision below is likewise consistent with *Pakovich* v. *Broadspire Services, Inc.*, 535 F.3d 601 (7th Cir. 2008). In *Pakovich*, a plan administrator denied a claim for disability benefits on the ground that a claimant was not totally disabled from her own occupation, as required to obtain benefits for 24 months, without deciding whether she was unable to work at any occupation, as required to obtain benefits beyond 24 months. *Id.* at 602. The district court reversed the "own occupation" determination but went on to find that the claimant was not disabled from all occupations and therefore was not entitled to benefits beyond 24 months. *Ibid.* The court of appeals held that because the plan administrator had not addressed the "all occupations" issue, the matter should have been remanded to the administrator to address that issue in the first instance. *Id.* at 602, 607. That holding is consistent with the decision below because, in *Pakovich*, the administrator had not previously interpreted the relevant plan provisions and the court

had neither already rejected the administrator's interpretation nor determined that the provisions did not address the relevant issue.[5]

3. The Xerox petitioners are also mistaken in contending (Pet. 29-32) that the court of appeals created a circuit conflict by reviewing the district court's choice of remedy for abuse of discretion. All but one of the cases on which the Xerox petitioners rely are non-ERISA decisions applying de novo review to interpretations of written documents. *FDIC* v. *Brants*, 2 F.3d 147, 150 (5th Cir. 1993); *Barrett* v. *Safeway Stores, Inc.*, 538 F.2d 1311, 1313 (8th Cir. 1976); *Emor, Inc.* v. *Cyprus Mines Corp.*, 467 F.2d 770, 773 (3d Cir. 1972); *NLRB* v. *Hobart Bros. Co.*, 372 F.2d 203, 206 (6th Cir. 1967); *Eddy* v. *Prudence Bonds Corp.*, 165 F.2d 157, 163 (2d Cir. 1947), cert. denied, 333 U.S. 845 (1948). None addressed the appropriate standard for reviewing a district court's choice of remedy for an ERISA violation. The only ERISA case cited by the Xerox petitioners, *Welsh* v. *Burlington Northern, Inc., Employee Benefits Plan*, 54 F.3d 1331 (8th Cir. 1995), also did not discuss what standard applies to review of a district court's choice of

[5] The decision below is also consistent with *Gallo* v. *Amoco Corp.*, 102 F.3d 918 (7th Cir. 1996), cert. denied, 521 U.S. 1129 (1997) (see Pet. 23-24 n.8). In *Gallo*, the Seventh Circuit held that an administrator could defend its interpretation of a plan with arguments that the administrator had not presented when denying the claim for benefits. *Id.* at 922-923. In dicta, the court stated that even if an administrator failed fully to explain the basis for its interpretation in judicial proceedings, the court would have to remand the case to the administrator unless a denial of benefits would clearly be unreasonable. *Id.* at 923. The dicta in *Gallo* is inapposite here because the Xerox administrator had already offered a full interpretation of the plan provisions, and the court of appeals had rejected that interpretation and determined that the provisions were silent on the relevant issue.

ERISA remedy. The court in *Welsh* appears to have applied de novo review in upholding a district court's computation of benefits under a plan that allowed an offset for benefits received under the Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.* 54 F.3d at 1340-1342. But the benefits decision turned on interpretation of a plan phrase, "primary amount of payment," and there is no indication that the administrator had previously interpreted that phrase or that the Eighth Circuit had rejected its interpretation. See *id.* at 1341. The court in *Welsh* therefore had no occasion to address the standard for reviewing a district court's calculation of benefits where, as here, the plan is silent on the relevant issue, the plan administrator had previously expressed a view on the issue, and the court of appeals had rejected that position as arbitrary and capricious and in violation of ERISA.

Accordingly, the issues presented in No. 08-810 do not warrant this Court's review.

B. The Issues In Nos. 08-826 And 08-803 Do Not Warrant This Court's Review

The issues presented in Nos. 08-826 and 08-803, which challenge the court of appeals' decision that the release petitioners knowingly and voluntarily waived their ERISA claims, also do not warrant this Court's review.

1. The courts of appeals generally require that releases of rights under ERISA be knowing and voluntary and assess the validity of releases according to the totality of the circumstances. See, *e.g.*, *Smart* v. *Gillette Co. Long-Term Disability Plan*, 70 F.3d 173, 181-182 (1st Cir. 1995); *Leavitt* v. *Northwestern Bell Tel. Co.*, 921 F.2d 160, 162 (8th Cir. 1990). The court below similarly

required the releases here to be knowing and voluntary and applied a "totality of the circumstances" test to make that determination. Pet. App. 16a-17a, 20a-21a. There is no reason for this Court to revisit that fact-bound application of settled law to the circumstances of this case.

2. The release petitioners in No. 08-826 argue (Pet. 9-20) that the court of appeals effectively created a new "group" standard by failing to apply the "totality of the circumstances" test separately to each individual who signed a release. The 08-826 petitioners do not, however, dispute the Xerox petitioners' assertion that they failed to submit any individualized facts in the district court or to argue in the court of appeals that additional factual development was required. See 08-803 & 08-826 Br. in Opp. 12, 14-15. In light of that failure, the court below cannot be faulted for not considering the individual circumstances of each person who signed a release.

3. The release petitioners in No. 08-803 argue (Pet. 9, 11-14) that the court of appeals erroneously failed to apply federal common law principles in considering the validity of the releases. They contend that the court should have invalidated the releases based on principles requiring employer-drafted documents to be strictly construed against the drafter, subjecting waivers of pension claims to closer scrutiny than waivers of general contract claims, precluding enforcement of releases that were the product of extreme economic pressure, and directing that the SPD controls if it conflicts with a plan document. *Id.* at 11-14.

At bottom, that argument is merely a case-specific disagreement with the court of appeals' conclusion that the releases clearly waived the release petitioners' ERISA claims. See 08-803 Pet. 14. That court's deci-

sion is not reasonably read as a holding that federal common law principles do not apply in ERISA cases. As petitioners acknowledge, the court of appeals has applied the strict construction, close scrutiny, and SPD principles in prior cases. See 08-803 Pet. 12-13 (citing Second Circuit cases). The court did not reject those principles here, but rather simply concluded that the releases were knowing and voluntary. Pet. App. 16a-20a. The court's holding that the waivers were knowing and voluntary appears to have been based on a conclusion that the language of the releases was sufficiently clear to preclude reliance on the common law principles cited by the 08-803 petitioners. See *id.* at 20a; accord *Smart*, 70 F.3d at 178-181 (recognizing federal common law principles but upholding severance agreement that the court found clearly included release of ERISA benefits). Whether the release language was, in fact, sufficiently clear to support the decision below is a fact-bound question that does not warrant this Court's attention.

The 08-803 petitioners also contend (Pet. 15-18) that the court of appeals erred by failing to apply to the ERISA claims here OWBPA standards for determining when a release is knowing and voluntary under the ADEA. As the 08-803 petitioners acknowledge (Pet. 15), however, the OWBPA "imposes specific requirements for releases covering ADEA claims," *Oubre* v. *Entergy Operations, Inc.*, 522 U.S. 422, 424 (1998)—not ERISA claims. See 29 U.S.C. 626(f)(1). The courts of appeals that have addressed the question agree that the OWBPA's requirements do not apply to releases of ERISA claims. *Chaplin* v. *NationsCredit Corp.*, 307 F.3d 368, 375-376 (5th Cir. 2002); *Madrid* v. *Phelps Dodge Corp.*, 211 Fed. Appx. 676, 680 (10th Cir. 2006).

The conclusion of the court below that the OWBPA is irrelevant to this case, Pet. App. 18a n.5, is consistent with those decisions. Review of the OWBPA issue is therefore not warranted.

4. Finally, contrary to the release petitioners' contention in their supplemental brief (08-803 & 08-826 Pet. Supp. Br. 3-10), *Kennedy* v. *Plan Administrator for DuPont Savings & Investment Plan*, 129 S. Ct. 865 (2009), provides no basis for either plenary review or vacating the decision below and remanding for further proceedings. In *Kennedy*, the Court held that a plan administrator was not required to give effect to a beneficiary's waiver of benefits due to her under the plan, because to do so would be contrary to ERISA's statutory requirement, in 29 U.S.C. 1104(a)(1)(D), that a plan shall be administered in accordance with the terms of plan documents. See 129 S. Ct. at 875. *Kennedy* may not govern the validity of the releases in this case. Unlike the waiver of benefits in *Kennedy*, the releases here purport to cover claims against the plan and its administrator, and the release petitioners' entitlement to benefits was in dispute when they signed the releases. In any event, the release petitioners did not raise a *Kennedy*-type claim in the courts below, and those courts did not address any such claim. Indeed, contrary to their new argument based on *Kennedy* that the releases are barred by statute, the release petitioners repeatedly argued below that federal common law governs the validity of releases of ERISA claims, and they sought this Court's review of whether the decision below "contravenes principles of contract interpretation under federal common law." 08-803 Pet. i. Accordingly, the release petitioners' *Kennedy* claim is not properly before this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General

CAROL A. DE DEO
Deputy Solicitor for National Operations
TIMOTHY D. HAUSER
Associate Solicitor
ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation
EDWARD D. SIEGER
Attorney
Department of Labor

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